SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A. Madden **PART** 11

Index Number : 600022/2009

WINSTON

VS

VULCAN CAPITAL MANAGEMENT

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 6-18-11

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ **Yes** ☐ **No**

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

FILED

JAN 19 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: January 12, 2012

_____ ***J.S.C.***

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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WINSTON & STRAWN, LLP,

Plaintiff,

-against-

Index No.
600022/09

VULCAN CAPITAL MANAGEMENT, INC.,
d/b/a VULCAN CAPITAL MANAGEMENT,

Defendant.

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Madden, J.:

Plaintiff Winston & Strawn, LLP (Winston) moves for summary judgment, pursuant to CPLR 3212, on its second cause of action for an account stated, and seeks an order, pursuant to 22 NYCRR § 216 and the Stipulation and Order for the Production and Exchange of Confidential Information previously entered herein, sealing those parts of Winston's motion papers which disclose information subject to the attorney-client and work product privileges. Defendant Vulcan Capital Management, Inc. (Vulcan Capital) cross-moves for an order sealing the parts of defendant's motion papers disclosing attorney-client or work product privileged information.

BACKGROUND

Winston is an international law firm. Vulcan Capital, a client of the firm, is a private equity investment company involved in, among other things, mergers and acquisitions transactions (Exhibit D to Affirmation of Michael Katz [Katz Affirm.]). During the relevant time period, Vulcan Capital had a number of portfolio companies and other affiliates. Ford F. Graham ("Graham") is Vulcan Capital's president and managing partner, and is the founding

general partner of the Vulcan Partners family of funds and portfolio companies (Affidavit of Ford F. Graham, dated February 7, 2011 [First Graham Aff.], ¶ 1; Affirmation of Michael J. W. Rennock, dated October 25, 2010, [Rennock Aff.], ¶ 5; Exhibit C to Katz Affirm.). At the relevant time, Kevin C. Davis was also a managing partner and the Chairman of Vulcan Capital (Rennock Aff., ¶ 5).

By letter dated August 17, 2005, Vulcan Capital retained Winston in connection with "general corporate and securities, financing and intellectual property matters, and other matters which you may from time to time request [Winston's] assistance" (Exhibit A to Rennock Aff., Engagement Letter, ¶ 1). In the Engagement Letter, the parties agreed that, for all the matters for which Vulcan Capital may request Winston's assistance, the firm's client will be Vulcan Capital and "not any parent, affiliate, subsidiary" (*id.*). The Engagement Letter sets forth the current hourly rates for firm attorneys, and provided that the bills would include allocable charges for costs and expenses incurred in performing legal services. It stated that invoices would be sent monthly, and that payment is expected within 30 days of the statement (*id.*, ¶¶ 2-4). It further provided with regard to affiliate waivers, that "[f]or all matters which you may from time to time request our assistance, Winston & Strawn LLP's client will be Vulcan Capital Management and not any subsidiaries or affiliates of Vulcan" (*id.* at ¶ 6). It provided that in agreeing to represent Vulcan Capital, Winston was not automatically creating an attorney-client relationship for conflicts-of-interest purposes with all of Vulcan Capital's portfolio companies and affiliates.

After the parties entered into this retainer agreement, Winston provided legal services with regard to seven matters, including: (1) an arbitration brought by Alamac American Knits LLC [Alamac] for breach of contract against Lumberton Power LLC (a Vulcan Capital

affiliated company for which Graham was president) to provide steam to Almac's power plant; (2) an arbitration brought by Plainville Electrical Products Company [PEPCO] against Vulcan Advanced Mobile Power Systems, LLC ("Vulcan AMPS"), a Vulcan Capital affiliated company for which Graham acted as president and secretary; (3) an action by former employee of Vulcan AMPS, Susan Flannigan, against Vulcan AMPS and Vulcan Capital for unpaid commissions for brokering a sale; (4) an action by former employee, Josh Rosen, against Vulcan Capital for unpaid bonuses; (5) a $13 million credit agreement between Vulcan Power Group LLC, Elizabethtown Power, LLC, Lumberton Power, LLC, and North Carolina Power Holdings, LLC (all Vulcan Capital portfolio companies or affiliates for which Graham was president and secretary) with a company called Del Mar Onshore Partners, L.P.; (6) a $4.2 million credit agreement between two additional Vulcan Capital portfolio companies or affiliates, Vulcan Highwall Mining, LLC and Vulcan Coal Investments, LLC (for which Graham, again, was president and secretary) with Del Mar Onshore Partners, L.P.; and (7) general corporate matters (First Graham Aff., ¶¶ 5, 8; Rennock Aff., ¶ 13).

Winston claims that it performed these legal services under the Engagement Letter, and that Vulcan Capital failed to pay the invoices for those services as agreed. On October 5, 2007, Winston sent a withdrawal letter to Graham, indicating that it was withdrawing as its counsel based on Vulcan Capital's failure to comply with its obligations under the Engagement Letter to pay the legal fees owed to Winston, despite promises that payment would be made (Affirmation of Richard Lawler, dated October 25, 2010 [Lawler Aff.], ¶ 29 and Exhibit J annexed thereto).

Thereafter, in January 2009, Winston commenced this action for breach of contract, and an account stated, in the amount of $873,225.34.

In moving for summary judgment on its account stated claim, Winston states that it is seeking $847,876.40, which is the $873,225.34 (Affidavit of Frank R. Smarra, dated October 25, 2010 [Smarra First Aff.], ¶ 5) total amount outstanding minus $25,348.94 in charges which are connected with Winston's services to Vulcan Capital with regard to certain patent matters (Exhibit B to Smarra First Aff.), and upon which Winston is not moving for summary judgment (Plaintiff's Memorandum in Support at 9 n.5; Plaintiff's Memorandum in Further Support at 9 n.9). Winston submits copies of its unpaid invoices with dates starting August 16, 2006 through to February 28, 2008, which indicate the matters for which services were provided, the tasks performed, the time spent, and the billing amount (Exhibit A to Smarra First Aff.).

Winston's Account Manager, Frank Smarra attests that as of January 31, 2007, Winston had sent invoices to Vulcan Capital totaling $1,197,528.10 (Smarra First Aff., ¶¶ 1, 3). Vulcan Capital and its portfolio companies made four payments to Winston for legal services (Exhibit A to Second Affidavit of Frank R. Smarra, dated March 9, 2011 [Smarra Second Aff.]). The first payment is by check from Vulcan Capital, dated June 16, 2006, in the amount of $234,708.44. The second payment is by check from Vulcan Highwall Mining, LLC, dated August 25, 2006, in the amount of $320,000. The third payment was a wire transfer of funds of $114,000 on December 9, 2006. Finally, the fourth payment appears to be from Vulcan Power Group, LLC received by Winston on January 11, 2007, in the amount of $22,000 (Smarra Second Aff., ¶ 2). These payments were only partial payments on the outstanding amounts for the various matters (*id.*, ¶¶ 5-9). The first three payments were applied to the oldest outstanding invoices first, and subsequent invoices reflected the reduced balances (*id.*, ¶ 4). These payments totaled

$690,784.44[1] (Smarra First Aff., ¶ 3). As of October 31, 2008, Smarra attests that Winston's outstanding invoices to Vulcan Capital totaled over $873,225.34, the amount sought in the complaint here (Smarra First Aff., ¶ 4, and invoices annexed as Exhibit A thereto), and Winston is seeking $847,876.40 on this motion.[2]

Winston partner Michael Rennock, the relationship and billing partner for Vulcan Capital, asserts that Graham and Davis requested that Winston represent Vulcan Capital in a number of matters (Rennock Aff., ¶¶ 11-12). He also states that in certain of these matters, Graham and Davis "also requested that Winston represent (i) them in their capacity as Vulcan Capital officers, or (ii) a Vulcan Capital portfolio company or other affiliate." (*id.*, ¶ 12). He affirms that Graham and/or Davis served as the client contact, indicated that Vulcan Capital would be responsible for Winston's legal fees, and that they were responsible for all client decisions (*id.*, ¶¶ 16-17). He also states that, at Graham's request, Winston's invoices for the matters at issue were addressed and sent to Vulcan Capital, to Graham's attention, and that neither Davis nor Graham ever advised him to address or send the invoices to any portfolio company or affiliate of Vulcan Capital (Rennock Aff., ¶¶ 18-20). He attests that these invoices were sent on a monthly basis, and that separate invoices were sent for each of the various matters (*id.*, ¶¶ 21-22). Rennock further attests that neither Graham nor Davis advised him, or any other Winston attorney, orally or in writing, of any objections to, or complaints regarding, the Winston invoices that Winston had sent for the matters for which it seeks recovery as an account stated

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[1]The figures total $690,708.44 and not $690,784.44.

[2]The amount sought on the account stated claim does not include $25,348.94 in charges on certain patent matters since Vulcan Capital objected to these charges.

(the Account Stated Matters) (*id.*, ¶ 23).

Winston also submits the affidavits of attorneys Richard F. Lawler, who worked on the PEPCO and Alamac arbitrations, and William M. Sunkel, who worked on the Flannigan and Rosen litigations, both of whom affirmed that they were never advised by Graham or Davis that they should seek payment of any invoice from any portfolio or other affiliate of Vulcan Capital, or that any of Winston's invoices should be directed to them (Lawler Aff., ¶¶ 2-3, 5, 11; Affirmation of William M. Sunkel [Sunkel Aff.], dated October 25, 2010, ¶¶ 2-4). With regard to objections, Lawler and Sunkel attested that neither Graham, Davis, nor any representative of a portfolio company or affiliate of Vulcan Capital, conveyed any objections or complaints regarding Winston's outstanding invoices for the Account Stated Matters (Lawler Aff., ¶ 10; Sunkel Aff., ¶ 5). Smarra attested that he did not recall discussing Winston's invoices with any representative of Vulcan Capital or any of its affiliates, except at a December 12, 2007 meeting in which he, Lawler, and Jon Goldstein, Winston's New York managing partner, met with a representative from Vulcan Capital, who indicated that Vulcan Capital was not financially able at that time to pay the total amount due and wanted to pay over time, but did not express any dissatisfaction, or seek any discount or reduction in the amount outstanding (Smarra First Aff., ¶¶ 6-7).

Winston further asserts that after Rennock left the firm, Lawler assumed responsibility for collecting on the balances due Winston from Vulcan Capital. Lawler states that he sought and obtained assurances from Graham and Davis that the amounts set forth in Winston's invoices were owed by Vulcan Capital, and that these bills would be paid in full (Lawler Aff., ¶¶ 7, 9, 15-28, 33, 35-36 and exhibits annexed thereto).

In opposition, Vulcan Capital urges that Winston is seeking recovery for work it performed for clients other than Vulcan Capital, and for which clients Winston has no engagement letter in violation with the requirements of 22 NYCRR § 1215.1. As a result, Vulcan Capital argues, Winston cannot recover on an account stated theory, but only in quantum meruit. Vulcan Capital then argues that for the small amount of work Winston performed for Vulcan Capital for "general corporate matters," the claimed fees are less than $50,000, in which case Winston is obligated to offer Vulcan Capital an opportunity to arbitrate the dispute as to fee.

Additionally, it argues that Winston fails to show that there was a debtor-creditor relationship with respect to the matters covered by the invoices, that any partial payment or promise to pay was made by Vulcan Capital, or that the invoices were retained without objection when the basis for the objection was not fully known to its clients. Further, Vulcan Capital contends that Winston fails to prove the amount it seeks on its claim, challenging that many of the invoices in Winston's moving papers are not contained in any files to which Vulcan Capital has access (*see* First Graham Aff., ¶¶ 13-14), and there is no proof that these invoices were sent to Vulcan Capital. Finally, it contends that it needs additional discovery.

Vulcan Capital submits Graham's affidavit in which he asserts that Winston was representing Vulcan Capital with regard to general corporate matters, but that it was representing Vulcan portfolio and affiliates (referred to as "Operating Companies") with regard to the remainder of the Account Stated Matters (First Graham Aff., ¶¶ 7-8). He claims that, as to the payments made, in most instances the invoices were paid "by or on behalf of the Operating Companies" (*id.*, ¶ 10). He states that, with respect to any discussions and correspondence between himself and Lawler, in May through October 2007, concerning the payment of

Winston's bills from the proceeds of other transactions, the only payments he was speaking about were payments from the Operating Entities, not from Vulcan Capital, and none of these discussions involved the amount owed Winston (*id.*, ¶¶ 12-13). He contends that he searched Vulcan Capital's and the Operating Companies' records, and cannot find a complete set of all the invoices Winston has submitted, and that any invoices he has found are "generally designated as belonging to the files of one or more of the Operating Companies" (*id.*, ¶ 13). Graham then states that he has a Statement of Account from Winston, dated September 15, 2008, but that it indicates an amount of $869,814.39, not the amount Winston seeks on this claim (*id.*, ¶ 14). Graham recounts the various matters for which Winston performed legal services, and asserts that Winston failed to contact certain potential witnesses with regard to both the PEPCO and Alamac arbitrations resulting in judgments against Vulcan Operating Companies, and that, with regard to the Del Mar Onshore Partners transactions, Winston was instructed to submit all bills prior to closing to be paid from the proceeds of the closing, and he does not understand how anything additional could be owed (*id.*, ¶¶ 21-32, 37).

As to objections, Graham asserts generally that "in 2005 and 2006 I complained to Mr. Rennock that plaintiff's defense of the PEPCO, Alamac, and Flannigan cases did not seem to be on par with the work that plaintiff had done on other matters," and that on at least one occasion Rennock agreed to his assertion and indicated that he would speak to his partners about finding better representation on those matters within the firm (*id.*, ¶ 17). In a supplemental affidavit, Graham states that while much of his old emails were unavailable because of computer crashes, he recently discovered emails between himself and Rennock in which he "complained about the quality of Winston's work, the delay in Winston's work products to the detriment of its client,

and the value of Winston's services in relation to its bills" (Supplemental Declaration of Ford F. Graham, dated July 21, 2011 [Graham Second Aff.], ¶¶ 3-5). For example, a June 5, 2006 email exchange indicates that Rennock was seeking payment of Winston's bill through May 2006 and asking if Graham had any issues with paying the amount due, to which Graham responded "as we talked we do have issues" (*id.*, ¶ 6 and Exhibit A annexed thereto). Graham submits a November 29, 2005 email in which he states, "This delay is on your firm's back. Given the prior delay, I should not have to be asking again" (*id.*, ¶ 7 and Exhibits B and C annexed thereto). In a March 3, 2006 email, Graham tells Rennock, "We need to talk. Not happy with Sunkel re: Rosen. You guys got to do better" (*id.*, ¶ 8 and Exhibit D annexed thereto). He states that he had multiple oral conversations with Rennock in which he stated his dissatisfaction with Winston's representation, and that part of the reason Vulcan Capital and the operating companies only made partial payments was because of their dissatisfaction with Winston's work, and the complaints Graham had lodged with Rennock as a result (*id.*, ¶¶ 9, 11).

In the course of briefing the motion and cross motion, it came to the parties,' and then to the court's attention, that while Winston retained electronic copies of Rennock's email in a separate archived file after he left the firm on January 31, 2007, on January 31, 2009, Winston destroyed the email file, as part of its routine business course. This was only 25 days after the complaint was filed in this action. Vulcan Capital argues that this destruction of evidence should preclude summary judgment in Winston's favor. Vulcan Capital asserts that it does not have this email evidence, including emails between Graham and Rennock, because Vulcan Capital's computer server crashed "on at least two occasions in 2007 or 2008" (*id.*, ¶ 4).

In reply, Winston contends that Vulcan Capital's claim of oral objections are insufficient

as a matter of law, because they fail to specify any particular invoice or amount therein that it objected to, when the objections took place or the substance of the conversations. In addition, it urges that even if there was some objection, it was rendered moot in light of the partial payments Vulcan Capital made. With regard to the unavailability of Rennock's email files, Winston urges that the only potentially relevant emails are ones in which Vulcan Capital objected to Winston's invoices, which presumably are still be in Vulcan Capital's possession.

DISCUSSION

The branch of the motion for summary judgment on the account stated claim is granted, and Winston is granted judgment on that claim in the amount of $847,876.40 with judicial interest. The branch of the motion and the cross motion, seeking an order sealing the papers submitted, pursuant to 22 NYCRR § 216 and the Stipulation and Order for Production and Exchange of Confidential Information signed and entered by this court on June 30, 2009, is denied. The court will first address the summary judgment motion, and then the motion and cross motion to seal.

To establish entitlement to summary judgment, the movant must make a prima facie showing entitling it to judgment as a matter of law; eliminating all triable issues of material fact (CPLR 3212 [b]; *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once the movant satisfies this standard, the burden shifts to the opponent to rebut the prima facie showing, by submitting evidence in admissible form sufficient to require a trial of material issues of fact (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]). Mere conclusions or unsubstantiated allegations or assertions are insufficient (*see Alvord & Swift v Muller Constr. Co.*, 46 NY2d 276, 281-282 [1978]).

Here, Winston has established a prima facie claim under the account stated theory. "'An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party or the other'" (*Shea & Gould v Burr*, 194 AD2d 369, 370 [1st Dept 1993], quoting *Chisholm-Ryder Co. v Sommer & Sommer*, 70 AD2d 429, 431 [4th Dept 1979]). Either retention of the bills without objection within a reasonable period of time or partial payment may give rise to an account stated (*Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51, 52 [1st Dept 2004]; *Biegen v Paul K. Rooney, P.C.*, 269 AD2d 264, 265 [1st Dept], *lv denied* 95 NY2d 761 [2000]). There must be a debtor-creditor relationship between the parties regarding the items forming the account, and an account may be so stated between an attorney and client (*see Shea & Gould v Burr*, 194 AD2d at 371; *Paul, Weiss, Rifkind, Wharton & Garrison v Koons*, 4 Misc 3d 447, 450 [Sup Ct, NY County 2004]). The account stated may be by an explicit promise to pay the outstanding bills, or an implicit agreement to pay (*see Morrison Cohen Singer & Weinstein, LLP v Ackerman*, 280 AD2d 355, 355-356 [1st Dept 2001]). "An implicit agreement to pay, warranting summary judgment, will arise from either the absence of any objection to a bill within a reasonable time or a partial payment of the outstanding bills" (*Paul, Weiss, Rifkind, Wharton & Garrison v Koons*, 4 Misc 3d at 450, citing *Chisholm-Ryder Co. v Sommer & Sommer*, 70 AD2d at 433; *see Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d at 52). While evidence of an oral objection to an account may be sufficient on a summary judgment motion to rebut the inference of an implicit agreement to pay, the oral objections must specify when and to whom oral objections were made, and specify the substance of the conversation (*Fink, Weinberger, Fredman, Berman & Lowell v Petrides*, 80 AD2d 781,

781-782 [1st Dept 1981], *appeal dismissed* 53 NY2d 1028 [1981]; *Darby & Darby v VSI Intl.*, 95 NY2d 308, 315 [2000]).

Winston has submitted copies of all the relevant outstanding invoices, and has submitted affidavits by parties with personal knowledge, indicating that these invoices were sent on a regular monthly basis to the address for Vulcan Capital given to Winston by Graham, and the invoices detailed the legal services rendered, the hours billed by the attorney or assistant, and the hourly rates, costs and expenses. Vulcan Capital's claim that it cannot find a complete set of these invoices in its own files does not warrant denial of Winston's motion. To the extent that Vulcan Capital takes issue with Winston's failure in submitting attorneys' affirmations on behalf of Rennock, Lawler and Sunkel, as opposed to affidavits (*see* CPLR 2106), this failure was timely remedied when these same affirmations were submitted thereafter in affidavit form (*see Berkman Bottger & Rodd, LLP v Moriarty*, 58 AD3d 539 [1st Dept 2009]). There is no indication Vulcan Capital was prejudiced by this technical defect in opposing this motion.

In addition, contrary to Vulcan Capital's contention, Winston has demonstrated a debtor-creditor relationship of attorney and client between the parties regarding the Account Stated Matters. The Engagement Letter covers "general corporate and securities, financing and intellectual property matters, and other matters which you may from time to time request our assistance," and the legal fees, costs, and expenses Vulcan Capital would be responsible for paying (Engagement Letter, § 1). It also provides that "for all matters which you may, from time to time request our assistance, the firm's client will be [Vulcan Capital] and not any . . . affiliate . . . of Vulcan" (*id.*). Winston has demonstrated that Graham and Davis requested that Winston represent Vulcan Capital, as well as the portfolio companies and/or themselves in the matters at

issue, acknowledged responsibility for legal bills, and made partial payment on those bills. Vulcan Capital fails to present any proof that it objected to being billed because it was not the client, which bills were sent, at Graham's request, to Vulcan Capital, for such legal services. Its attempt to claim in opposing this motion that it was not in a debtor-creditor relationship with Winston is without merit and undermined by its own actions.

Vulcan Capital's argument that Winston failed to comply with Rule 1215.1 (22 NYCRR) with regard to proper engagement letters barring any account stated claim, is rejected for two reasons. First, the Engagement Letter properly explains the scope of legal services, the attorneys' fees and expenses to be charged, its billing practices, and Vulcan Capital's right to seek arbitration in the event of a fee dispute (Exhibit A to Rennock Aff., Engagement Letter, §§ 1-4; 22 NYCRR § 1215.1). Second, the Appellate Division, First Department recently held that a law firm's failure to comply with Rule 1215.1's requirements does not preclude recovery on an account stated claim (*Roth Law Firm, PLLC v Sands*, 82 AD3d 675, 676 [1st Dept 2011]; *Thelen LLP v Omni Contr. Co.*, 79 AD3d 605, 605-606 [1st Dept 2010], *lv denied* 2011 NY Slip Op 86874, 2011 WL 4916548, 2011 NY LEXIS 3057 [2011]). Similarly, Vulcan Capital's claim that Winston failed to comply with Part 137 of the Rules of the Chief Administrator (22 NYCRR Part 137), which requires that where the amount of attorneys' fees in controversy is $50,000 or less the matter be arbitrated, is unavailing. The complaint and the summary judgment motion both clearly seek amounts in excess of $50,000, and, therefore, Part 137 is inapplicable (*see Eiseman Levine Lehrhaupt & Kakoyiannis, P.C. v Torino Jewelers, Ltd.*, 44 AD3d 581, 583 [1st Dept 2007]).

Winston has presented prima facie proof that Vulcan Capital made explicit promises to

pay the outstanding balance, and Vulcan Capital does not dispute this. Winston has submitted an affidavit, as well as emails and telephone conference notes, from Lawler, who had sought and obtained assurances from Graham and Davis regarding the payment of the outstanding invoices as a condition to further legal representation. Lawler attests that Graham advised him on May 1, 2007, that Vulcan Capital would be in a position to pay Winston's outstanding bills the following week after a transaction closing. Then, on May 11, 2007, in response to Lawler's email asking again about payment, Graham advised that Vulcan Capital was still working on the closing. On July 10, 2007, in response to Lawler's inquiries regarding payment of outstanding invoices, Davis stated that Winston was on the list to be paid in 60 to 90 days when Vulcan Capital completed its financing, and then on July 18, 2007, Graham indicated that Vulcan Capital had closings scheduled that would allow it to pay down some of its bills. On July 24, 2007, Graham sent an email to Lawler stating that when the first financing closed "[w]e can then start path to repayment, but we need to close all to get you whole." Again, on September 13, 2007, Davis called Lawler and stated that he knew that Vulcan Capital owed Winston money, and intended to pay its bill. In an email dated October 18, 2007, Graham advised Lawler that Vulcan Capital hoped to pay part of Winston's bill, and have Winston continue to represent it. In a meeting on December 12, 2007, Davis indicated that Vulcan Capital was selling some oil and gas properties, that it would use some of the proceeds to pay Winston's outstanding invoices, and that it was not asking for the amount due to be reduced, but just that Vulcan Capital be permitted to pay the amount due over time.

Vulcan Capital does not dispute that these promises were made by Graham and Davis, but contends that they were not made on behalf of Vulcan Capital. This argument is unpersuasive.

The outstanding balance was for legal fees for services requested by Graham and Davis on behalf of Vulcan Capital. Vulcan Capital may not avoid its obligation by pointing to its various affiliates and portfolio companies, particularly when it failed to make such distinctions when it requested services, and when it communicated its promises to pay.

Winston has also demonstrated that Vulcan Capital has made, or caused its portfolio companies and/or affiliates to make, four partial payments against the outstanding balance due. Such partial payment is an acknowledgment of the validity of the bill, implying an agreement to pay (*see Morrison Cohen Singer & Weinstein, LLP v Ackerman*, 280 AD2d at 355-356; *Parker, Chapin, Flattau & Klimpl v Daelen Corp.*, 59 AD2d 375, 378 [1st Dept 1977]). The first payment was by check dated June 16, 2006, directly from Vulcan Capital, in the amount of $234,708.44 (Exhibit A to Smarra Second Aff.). Contrary to Vulcan Capital's claim in opposition, this payment could not have been made only regarding work Winston did for Vulcan Capital, because according to Vulcan Capital, Winston solely represented it on matters indicated on the invoices as "General Corporate." Those invoices only amounted, as of that date, to $35,562.30 (*see* Smarra Second Aff., ¶ 6). Thus, it is clear that the payment of $234,708.44 was made by Vulcan Capital in payment on the total outstanding balance.

Winston has also established that the three other partial payments were made in payment of the total outstanding balance. The August 25, 2006 payment of $320,000.00 by Vulcan Highwall Mining, LLC, could not have been solely for services provided regarding the Vulcan-Highwall Agreement, since the total outstanding amount for those services at that time was only $9,506.25. Similarly, the December 9, 2006 payment of $114,000.00 by Vulcan Power Group, LLC, could not have been solely for services provided regarding the Vulcan Power Group

Agreement, since the total outstanding amount due for those services at that time was only $40,048.48.

Winston also has made a prima facie showing that Vulcan Capital failed to object within a reasonable time, and Vulcan Capital fails to raise a triable issue. "'Whether a bill has been held without objection for a period of time sufficient to give rise to an inference of assent, in light of all the circumstances presented, is ordinarily a question of fact, and becomes a question of law only in those cases where only one inference is rationally possible'" (*Yannelli, Zevin & Civardi v Sakol*, 298 AD2d 579, 580 [2d Dept 2002], quoting *Legum v Ruthen*, 211 AD2d 701, 703 [2d Dept 1995]).

Here, the only inference rationally supported by the record is that Vulcan Capital assented to the correctness of the invoices for the Account Stated Matters. Vulcan Capital fails to present legally sufficient evidence that it objected to the invoices. An undocumented assertion of an oral objection is insufficient to defeat an account stated. Vulcan Capital's claim that it orally objected is insufficient, because it fails to state when it objected, and the specific substance of the conversations in which the objections were made (*see Zanani v Schvimmer*, 50 AD3d 445, 446 [1st Dept 2008] [client's oral objections insufficient where she failed to state when objected or specific substance of conversations, just stating that she told attorney that she would "address the issue with him" after matter was over]; *Levisohn, Lerner, Berger & Langsam v Gottlieb*, 309 AD2d 668 [1st Dept 2003], *lv denied* 1 NY3d 509 [2004]; *Shea & Gould v Burr*, 194 AD2d at 371; *Fink, Weinberger, Fredman, Berman & Lowell v Petrides*, 80 AD2d 781, *supra*).

Graham's allegations of occasional oral objections are vague and unsupported. In fact, Graham never states that he objected to any particular invoices, or any specific amounts, and

fails to state the specific substance of the conversations. Nor do the emails relied on by Vulcan Capital support its defense of objections to the invoices. In the November 29, 2005 and February 18, 2006 emails, Graham simply complains that a delay "is on your firm's back," and states "[l]et's not dally like last time," and makes no mention of the invoices and amounts due. Similarly, the March 3, 2006 email states that Vulcan was not happy with Sunkel in the Rosen litigation, but does not mention the invoices, or any charges even with regard to that litigation. The June 5, 2006 email cryptically states that "we do have issues," but fails to state what the issues were, whether the issues involved the invoice amounts, or which invoices were being addressed. Absent from Graham's affidavits are any details about the nature of these issues, or any specifics of the conversation regarding the invoices. Accordingly, as Vulcan Capital fails to disclose the nature or specific content of its claimed questions and discussions, fails to assert whether it objected to the invoices, and which invoices were questioned or even discussed, it has not raised a triable issue of fact (*see Schulte Roth & Zabel, LLP v Kassover*, 80 AD3d 500, 501 [1st Dept], *lv denied* 17 NY3d 702 [2011] [summary judgment granted to plaintiff where defendant made occasional oral objections which did not relate objection to specific amount or invoice, and had extensive history of partial payments and writings acknowledging debt]; *see also Darby & Darby v VSI Intl.*, 95 NY3d at 315 [self-serving bald allegations of oral protests insufficient to raise triable issue]; *cf. Yannelli, Zevin & Civardi v Sakol*, 298 AD2d at 580-581 [where plaintiff's final version of bill reflected increase in balance due for "ERROR RE: PAYMENT," and defendant submitted written proof of her complaints that bill was not apportioned between herself and another client, summary judgment denied to plaintiff]).

Moreover, it is well-settled that where, as here, a defendant makes a partial payment

against a bill, it acknowledges the validity of that bill, establishing it as an account stated (*see Schulte Roth & Zabel, LLP v Kassover*, 80 AD3d at 501 [summary judgment to plaintiff on account stated where the defendant was unable to relate any objection to specific amount or invoice, and had history of partial payment and writings acknowledging debt]; *Zanani v Schvimmer*, 50 AD3d at 446 [clients' claim that they disputed bills all along contradicted by fact of partial payment on substantial number of bills]; *Biegen v Paul K. Rooney, P.C.*, 269 AD2d 264, *supra*; *Coudert Bros. v Finalco Group*, 176 AD2d 622, 623 [1st Dept 1991]). As discussed above, on June 16, 2006, just 11 days after the last email Vulcan Capital submits claiming objections, it made a payment of $234,708.44, and then goes on to make three more substantial partial payments. In addition, Winston has submitted emails in which Vulcan Capital acknowledges the debt, promising to submit additional payments (Lawler Aff., ¶¶ 7, 9, 15-28, 33, 35-36, and exhibits annexed thereto). Based on this proof, Winston has demonstrated that it is entitled to summary judgment on its claim for account stated in light of Vulcan Capital's failure to object to Winston's invoices for the Account Stated Matters, and the partial payments and acknowledgment of the debt.

Vulcan Capital's argument that summary judgment should be denied to Winston as a spoliation of evidence sanction, because it destroyed Rennock's email file shortly after this action was commenced, is unavailing under the circumstances presented. Even if Vulcan Capital had made a motion for sanctions pursuant to CPLR 3126, which it did not, it would have had to prove that the evidence allegedly lost or destroyed actually existed, that it was under the opposing party's control, and that there was no reasonable explanation for the failure to produce the evidence (*see Wilkie v New York City Health & Hosps. Corp.*, 274 AD2d 474, 474 [2d Dept],

lv denied 96 NY2d 705 [2000]). The only emails in Rennock's files relevant to this motion would be emails between Winston and Rennock with respect to Winston's invoices, including Vulcan Capital's objections, if any. Vulcan Capital has not proffered any evidence that the alleged missing emails ever existed in the first place. It offers only surmise and conjecture that any previously undisclosed, relevant emails existed, and were spoliated to its prejudice. More importantly, Vulcan Capital's emails would have been created by, and originated with, Vulcan Capital, and thus presumably should still be in its possession. Where other evidence exists, such as Vulcan Capital's own email files, which is sufficient to establish the claim or defense, sanctions may be denied (*see Myers v Sadlor*, 16 AD3d 257, 258 [1st Dept 2005]; *see also Steuben Foods, Inc. v Country Gourmet Foods, LLC*, 2011 WL 2132974, * 1-2, 2011 US Dist LEXIS 43195, * 6 [WD NY 2011]). Documents which still exist cannot be found to have been spoliated (*see Ecor Solutions, Inc. v State of New York*, 17 Misc 3d 1135 [A], 2007 NY Slip Op 52261 [U], 2007 WL 4225413 [NY Ct Cl 2007]). To the extent that Vulcan Capital claims its emails are not in its possession, then it either did not actually create them, or it failed to preserve them. As to any arguments regarding Rennock's emails, Vulcan Capital has failed to identify any emails or to specify their content. Under these circumstances, Winston will not be sanctioned with respect to Rennock's email file.

Finally, the motion and the cross motion to seal the papers submitted on these motions, are both denied. Both parties assert that information has been redacted from their papers pursuant to the Stipulation and Order for the Production and Exchange of Confidential Information so ordered by this Court on June 30, 2009. They now seek to have the unredacted papers sealed, because they allegedly may contain attorney-client or work product privileged

information.

Generally, courts are reluctant to allow the sealing of court records, even where both parties have requested sealing (*Gryphon Domestic VI, LLC v APP Intl. Fin. Co., B.V.*, 28 AD3d 322, 324 [1st Dept 2006], *lv denied* 10 NY3d 705 [2008]; *see Liapakis v Sullivan*, 290 AD2d 393, 394 [1st Dept 2002]; *Matter of Brownstone*, 191 AD2d 167, 168 [1st Dept 1993]). There is a broad constitutional presumption that the public as well as the press are entitled to access to court proceedings (*Danco Labs., Ltd v Chemical Works of Gedeon Richter, Ltd.*, 274 AD2d 1, 6 [1st Dept 2000]). The right of access to court records and proceedings is firmly based on common-law and New York statutory principles that civil proceedings should be open to the public to "ensure that they are conducted efficiently, honestly and fairly" (*Matter of Conservatorship of Brownstone*, 191 AD2d at 168). There is a correlating common-law right to inspect and copy judicial records which is "'beyond dispute'" (*Gryphon Domestic VI, LLC v APP Intl. Fin. Co., B.V.*, 28 AD3d at 324, quoting *Danco Labs., Ltd v Chemical Works of Gedeon Richter, Ltd.*, 274 AD2d at 6). Thus, judicial proceedings are presumptively open to the public, unless compelling reasons for closure are presented (*Mosallem v Berenson*, 76 AD3d 345, 349 [1st Dept 2010]). "Confidentiality is clearly the exception, not the rule" (*Matter of Hofmann*, 284 AD2d 92, 93-94 [1st Dept 2001]).

Section 216.1 (a) of the Uniform Rules of Trial Courts directs that:

> except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interest of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe

appropriate notice and opportunity to be heard.

(22 NYCRR § 216.1 (a); *see also Liapakis v Sullivan*, 290 AD2d 393, *supra*; *Matter of Hofmann*, 284 AD2d at 93).

A sealing order should "'clearly be predicated upon a sound basis or legitimate need to take judicial action'" (*Mosallem v Berenson*, 76 AD3d at 349 [citation omitted]; *see also Danco Labs., Ltd v Chemical Works of Gedeon Richter, Ltd.*, 274 AD2d at 8), and a court must make an independent determination of good cause (*Gryphon Domestic VI, LLC v APP Intl. Fin. Co., B.V.*, 28 AD3d at 324-325). Sealing has only been authorized in strictly limited situations such as to protect trade secrets, or to preserve the privacy of an infant (*id.*; *see e.g. Matter of Bernstein v On-Line Software Intl.*, 232 AD2d 336, 337 [1st Dept 1996], *lv denied* 89 NY2d 810 [1997] [trade secrets]; *Matter of Twentieth Century Fox Film Corp.*, 190 AD2d 483, 486-487 [1993] [privacy of infant]).

No legitimate basis has been stated by either party which warrants the sealing of the documents in this action. Both parties have failed to demonstrate good cause. Neither party has shown why the documents are so confidential or sensitive that public access to them should be restricted (*see Mosallem v Berenson*, 76 AD3d at 349). Their references to "attorney work product" and "attorney-client privilege" alone are not sufficient to justify sealing the matter (*see Matter of Brownstone*, 191 AD2d at 168 [reference in lower court order to attorney work product was not sufficient to justify sealing records). They have failed to present evidence that justifies the private need for the secrecy of the record and, thus, have not overcome the presumption of openness. The mere fact that there may be little public interest in this particular action does not constitute good cause to seal (*see Danco Labs., Ltd v Chemical Works of Gedeon Richter, Ltd.*,

274 AD2d at 6).

In view of the above, it is

ORDERED that the motion for summary judgment on the account stated claim is granted, and the Clerk is directed to enter judgment in favor of plaintiff Winston & Strawn, LLP and against defendant Vulcan Capital Management, Inc d/b/a Vulcan Capital Management in the amount of $847,876.40, together with interest as calculated by the Clerk; and it is further

ORDERED that the motion and cross motion to seal are denied; and it is further

ORDERED that the breach of contract cause of action is severed; and it is further

ORDERED that the parties shall appear for a status conference in Part 11,60 Centre Streeet, New York, NY,. room 351, on February 2, 2012 at 9:30 am.

FILED

JAN 19 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 12 2012

J.S.C.